IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. ~~78-423~~

FRED CHEIMAN and
NICHOLAS SARDELIS, JR.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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The Petitioners, FRED CHEIMAN and NICHOLAS SARDELIS, JR., respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on June 26, 1978.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. An oral opinion was rendered by the District Court for the Eastern District of Michigan, Southern Division, which opinion was not reported and a transcript thereof appears in the Appendix hereto. A written Judgment of Acquittal appended hereto, was entered on January 11, 1977.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on June 26, 1978. A timely petition for re-hearing was denied on August 18, 1978, and this Petition for Certiorari was filed within thirty (30) days of that date. This Court's jurisdiction is invoked under Title 28, United States Code, §1254(1).

QUESTIONS PRESENTED

I. Whether the Government's appeal from the District Court's entry of a Judgment for Acquittal after a jury verdict was authorized by Title 18, United States Code, §3731?

II. Whether an attempt by a storeowner to obtain a confession and restitution from an employee, whom he believes to have stolen merchandise, can constitute an attempt to collect an extension of credit by use of extortionate means in violation of Title 18, United States Code, §894?

III. Whether, if an employer's attempt to obtain a confession and restitution from an employee for the theft merchandise is within the ambit of Title 18, United States Code, §894, the evidence adduced at trial showed an extension of credit and an attempt to collect upon an extension of credit?

STATUTORY PROVISIONS INVOLVED

1. Constitution of the United States — Amendment V:

   No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Title 18, United States Code, §3731:

   In a criminal case an appeal by the United States shall lie to a Court of Appeals from a decision, judgment, or order of a District Court dismissing an indictment or information as to any one or more courts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

   An appeal by the United States shall lie to a Court of Appeals from a decision or order of a District Court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeop-

ardy and before the verdict or finding on an indictment or information, if the United States attorney certified to the District Court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

The appeal in all such cases shall be taken within thirty (30) days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be released in accordance with Chapter 207 of this title.

The provisions of this section shall be liberally construed to effectuate its purposes.

3. Title 18, United States Code, Federal Rules of Criminal Procedure, Rule 29:

(a) Motion before submission to jury. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

(b) Reservation of declaration on motion. If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict.

(c) Motion after discharge of jury. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within seven (7) days after the jury is discharged or within such further time as the court may fix during the seven-day period. If a verdict of guilty is returned, the court may on such motion set aside the verdict and enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury.

4. Title 18, United States Code, §891:

(1) To extend credit means to make or renew any loan, or to enter into any agreement, tacit or express, whereby the repayment of satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred.

(2) The term "creditor", with reference to any given extension of credit, refers to any person making that extension of credit, or to any person claiming by, under, or through any person making that extension of credit.

(3) The term "debtor", with reference to any given extension of credit, refers to any person to whom that extension of credit is made, or to any person who guarantees the repayment of that extension of credit, or in any manner undertakes to indemnify the creditor against loss resulting from the failure of any person to whom that extension of credit is made to repay the same.

(4) The repayment of any extension of credit includes the repayment, satisfaction, or discharge in whole or in part of any debt or claim, acknowledged or disputed, valid or invalid, resulting

from or in connection with that extension of credit.

(5) To collect an extension of credit means to induce in any way any person to make repayment thereof.

(6) An extortionate extension of credit is any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make payment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person.

(7) An extortionate means is any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person.

(8) The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and territories and possession of the United States.

(9) State law, including conflict of laws rules, governing the enforceability through civil judicial processes of repayment of any extension thereof shall be judicially noticed. This paragraph does not impair any authority which any court would otherwise have to take judicial notice of any matter of State law.

5. Title 18, United States Code, §894:

(a) Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means

(1) to collect or attempt to collect an extension of credit, or

(2) to punish any person for the nonrepayment thereof,

shall be fined not more than $10,000 or imprisoned not more than twenty (20) years, or both.

(b) In any prosecution under this section, for the purpose of showing an implicit threat as a means of collection, evidence may be introduced tending to show that one or more extensions of credit by the creditor were, to the knowledge of the person against whom the implicit threat was alleged to have been made, collected or attempted to be collected by extortionate means or that the nonrepayment thereof was punished by extortionate means.

(c) In any prosecution under this section, if evidence has been introduced tending to show the existence, at the time of the extension of credit in question was made, of the circumstances described in section 892(b)(1) or the circumstances described in section 892(b)(2), the direct evidence of the actual belief of the debtor as to the creditor's collection and practices is not available, then for the purpose of showing that words or other means of communication, shown to have been employed as a means of collection, in fact carried an express or implicit threat, the court may in its discretion allow evidence to be introduced tending to show the reputation of the defendant in any community of which the person against whom the alleged threat was made was a member at the time of the collection or attempt at collection.

STATEMENT OF THE CASE

Petitioner, FRED CHEIMAN, a pharmacist, was a part owner of three (3) drugstores in the metropolitan Detroit area, including the Fox-Hills Medi-Mart in Bloomfield Hills, Michigan. This particular drugstore had lost approximately Eight Thousand Eight Hundred Ninety ($8,-

890.00) Dollars between its opening on March 4, 1974, and August 31, 1974. Several suppliers had refused to provide merchandise unless paid in cash. Arthur Sklar was hired, as a pharmacist in September, 1974. His employment was to be a prelude to becoming a shareholder in the corporation. He was to receive a twenty-five (25%) percent interest at a cost of Fifteen Thousand ($15,000.00) Dollars to Eighteen Thousand ($18,000.00) Dollars. He was aware that his employment was contingent upon his becoming a shareholder. Despite this knowledge and his decision not to become a shareholder, Sklar did not so inform your Petitioner.

In operating the three (3) drugstores, pharmaceuticals were often transferred between stores. Sklar seemingly prepared such a package on November 3, 1974. Petitioner Cheiman was informed of this by another employee, who was asked to "keep her eyes open". The employee hid this package and showed it to Cheiman the next morning. They both felt Sklar was stealing the pharmaceuticals.

After ascertaining that the drugs had not been requested by his other stores, Cheiman, accompanied by Sardelis, who was to provide legal advice, and Stanley Wieczorek, an indicted co-conspirator and pharamacist employed by Cheiman, arranged to confront Sklar about the thefts. Their purpose was to obtain a confession and restitution. At no time did they mention attempting to threaten or scare Sklar.

Upon arriving at the Medi-Mart drugstore, Sardelis and Wieczorek went into the stockroom. Shortly thereafter Sklar entered the stockroom to fix a toilet, having been notified of this task by an employee. He was followed by Cheiman who, carrying the November 3, 1974 bag of drugs, confronted Sklar with the thefts. Sklar claimed the drugs were to be transferred to a second of Cheiman's drug-

stores. However, when informed that both stores denied requesting a transfer, Sklar signed a confession.

At trial Sklar testified to being pushed, tapped with a baseball bat and threatened with a gun. This was rebutted by Cheiman and Wieczorek, neither of whom saw a gun or the menacing use of a baseball bat.

Once the confession was signed, Cheiman went into the store area and returned with a Medi-Mart check which was altered to make Sklar the drawer and Medi-Mart, the drawee. The Seven Thousand ($7,000.00) Dollar amount was not changed by Sklar even though he was given an opportunity to do so. Immediately after signing this check, which contained a statement that it was signed voluntarily, Sklar went home.

Sklar, after conferring with his wife, an attorney and a friend who was a police officer, called the F.B.I. The F.B.I. then proceeded to set up a series of recorded conversations between Sklar and Cheiman which was precipitated by Sklar at the F.B.I.'s request. Sardelis called Sklar only because Sklar repeatedly requested that he do so.

The first telephone call, on November 8, 1974, was placed by Special Agent Harrell of the F.B.I. In it Sklar told Cheiman that he could not get money from his brother and that his "wife won't sign". Cheiman, when pressed for information by Sklar, informed Sklar that he would "have to deal with Nick". Later in the conversation, Cheiman, in response to a request that Sklar not be called at home, stated "I have no control over these things . . . I have answers to give and I gave them a good answer, I told them Art Sklar. I didn't set you up, you set yourself up cause you're a thief." Cheiman testified that the "them" referred to was Jack Polsky and Alan Goldfarb, his partners in the drugstores. In the electronically intercepted conversation between Sklar and Cheiman, which took place in the Medi-Mart store in the afternoon of November 8, 1974,

Cheiman again referred to "them" in the context of his partners.

The transcripts of the conversations between Sklar and Cheiman indicate that Cheiman was interested only in obtaining an admission of the theft from Sklar. The telephone call to Sklar placed on November 14, 1974, by Sardelis was in response to Sklar's request that Cheiman have Sardelis call him. The call was not meant to frighten Mrs. Sklar. All Sardelis did was state that Sklar should hurry and pay off his debts, such being an acceptable and common practice among collectors employed by local banks as Sardelis had been.

At all times during the course of the events in 1974 and during the trial, Petitioners maintained that their sole objective was to confront Sklar with the theft and obtain a confession. The amount of merchandise stolen was not important to the Petitioners as the admission of the theft. The Seven Thousand ($7,000.00) Dollar figure used by Cheiman was an approximation of the amount Sklar could have taken given the value of the pills found by Miss Lefton and the length of time which Sklar was employed at Medi-Mart.

Sardelis accompanied Cheiman on November 6, 1974, for the sole purpose of providing legal advice, Sardelis being a law school graduate studying for the Michigan Bar Examination.

Sardelis testified that he brought his gun, which he had a license to carry and which was duly registered, to the Medi-Mart store so that he could go directly about other legal business after the confrontation with Sklar. He denied threatening Sklar. Sardelis did make two (2) calls to the Sklar home. In neither of these did he intend to scare anyone. He merely used the tone of voice used by most professional collection agents.

Having heard the evidence and the jury's verdict, the Honorable Robert E. DeMascio orally ruled that:

> "as a matter of law the effort of any defendant to gain restitution from one who the defendant believes stole from him, cannot and does not come within the class of activity which Congress sought to prohibit."

As an alternate ground for its ruling, the Court stated:

> "In our view, even accepting the government's theory that this case is within the class of activities covered by the statute, the defendants would still have to be acquitted. The government has, as a matter of law, failed to sustain its burden of proof to establish an extention of credit."

The Government did no more than prove that a confession was elicited from Sklar. No agreement to make restitution was ever entered into. The Government further failed to show that any efforts or attempts by extortionate means or otherwise, were made to collect upon the confession.

In the written judgment entered January 11, 1977, the Court, pursuant to Rule 19 of the Federal Rules of Criminal Procedures, held:

> "the court being of the view that the facts presented and the court ruling as a matter of law that an attempt to obtain restitution for a theft does not constitute a violation of 18 USC §894."

Thus, the jury verdicts of guilty on Count II as to Defendant Cheiman and Counts II and II as to Defendant Sardelis were set aside and a judgment of acquittal as to each Defendant was entered.

The Sixth Circuit Court of Appeals reversed stating that the statute, Title 18, United States Code, §894, reached the

activities of Petitioners and the Government had a right to appeal.

The District Court had jurisdiction based upon a criminal indictment handed down by a grand jury in the Eastern District of Michigan charging a violation of a federal statute, to wit: Title 18, United States Code, §894.

REASONS FOR GRANTING THE WRIT

(1) The Court Of Appeals Has Decided An Important Question Of Federal Law Which Was Not, But Should Be, Settled By This Court.

Title 18, United States Code, §3731 permits the Government to appeal in a criminal case except "where the double jeopardy clause of the United States Constitution prohibits further prosecution." In the instant case, Petitioners moved for a Judgment of Acquittal at the close of the Government's proofs. A decision on this motion was reserved by the court. After the jury verdict was returned, the court granted Petitioners' motion and entered a Judgment of Acquittal. In so doing the court found, as a substantive matter that:

> "even accepting the government's theory that this case is within the class of activities covered by the statute, the defendants would still have to be acquitted. The government has, as a matter of law, failed to sustain its burden of proof to establish an extension of credit."

This finding "represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *United States* v *Martin Linen Supply Co,* 430 US 564, 571 (1977). As such a retrial of Defendants on the same charge is barred.

Had the finding that the evidence produced by the Government at trial was insufficient to sustain a conviction been made by a Court of Appeals, Petitioners would be protected from further criminal proceedings on the same charges. *Burks* v *United States,* ..... US ....., 98 S Ct ....., 57 L Ed 2d 1 (1978). Two quotations from *Burks, supra,* are enlightening. In the first of these the court confirms that where the District Court enters a judgment of acquittal further prosecution is barred.

> "By deciding that the government had failed to come forward with sufficient proof of petitioner's capacity to be responsible for criminal acts, that court was clearly saying that Burks culpability had not been established. *If the District Court had so held in the first instance, as the reviewing court said it should have done, a judgment of acquittal would have been entered and, of course, petitioner could not be retried for the same offense.*
>
> . . .
>
> *The double jeopardy clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. This is central to the objective of the prohibition against successive trials."* *Burks, supra,* at 9. (Emphasis added).

The second question was adopted by the court from the concurrence of Mr. Justice Douglas in *Sapir* v *United States,* 348 US 373 (1955). In adopting this statement the court expressly overruled all prior decisions which reflected a different rule. In so doing the court stated:

> "The correct rule was stated in *Kepner* v *United States,* 195 US 100, at 130, 'it is, then, the settled law of this court that former jeopardy includes one who has been acquitted by a verdict duly rendered. . . .' If the jury had acquitted, there plainly would be double jeopardy to given the government another go

> at this citizen. If, as in the *Kepner* case, the trial judge had rendered the verdict of acquittal, the guarantee against double jeopardy would prevent a new trial of the old offense. I see no difference when the appellate court orders a judgment of acquittal for lack of evidence." 348 US, at 374. *Burks, supra,* at 7.

Thus, it is clear, (1) that where the trial judge makes a resolution of a factual element of the offense charged, further prosecution is barred by the Double Jeopardy Clause, *Martin Linen, supra;* (2) that where an appellate court enters a judgment of acquittal based on the insufficiency of the evidence, further prosecution is barred, *Burks, supra;* and (3) that where the trial judge enters a judgment of acquittal, further prosecution is also barred, *Sapir, supra; Kepner, supra.*

Petitioners contend that these decisions also stand for the proposition that where a trial judge reverses a jury verdict based upon a finding that the Government's evidence was insufficient to sustain a conviction, further prosecution, including an appeal by the Government, is barred by the Double Jeopardy Clause of the Fifth Amendment as integrated into Title 18, United States Code, §3731.

Indeed this very issue has already been docketed for decision this term by the Supreme Court in *Schoenhut* v *United States,* Docket No: 78-13 (1978).

(2) The Court Of Appeals Has So Far Sanctioned A Departure From The Accepted And Usual Course Of Judicial Proceedings By The District Court As To Call For An Exercise Of This Court's Power Of Supervision.

Rule 29(a) requires the trial court to make a ruling by either granting or denying a judgment of acquittal when such a motion is presented at the close of the Government's case in chief. Only where such a motion is made at the close of all evidence is the court permitted to reserve its decision. Federal Rules of Criminal Procedure, Rule 29(b). This procedural distinction is based upon the notion that the Government always carries the burden of establishing a prima facie case. *Jackson* v *United States,* 250 F2d 897 (5th Cir 1958), *Cephus* v *United States,* 324 F2d 893 (DC Cir 1963). Reservation of a ruling upon defendant's motion pursuant to Rule 29(a) is widely recognized as error. *United States* v *Wininger,* 427 F2d 1128 (6th Cir 1970); *United States* v *House,* 551 F2d 756 (8th Cir 1977); *Cephus, supra; Jackson, supra.*

The constitutional ramifications of the trial court's reservation of its ruling on Petitioners' initial motion at the close of the Government's proofs derives from the 1970 amendments to Title 18, United States Code, §3731. Under this amendment the constitutional impact upon a Rule 29(a) motion is obvious. In the instant case had the trial court fulfilled its obligation under Rule 29(a), the Government would be foreclosed from bringing this appeal. *United States* v *Robbins,* 510 F2d 301 (6th Cir 1975). Thus, if the Government is permitted to continue this appellate process it obtains this right by virtue of the trial court having overlooked the mandatory nature of Rule 29(a) in order to guarantee, in the words of Judge DeMascio, "that the Government have a right to appeal."

Petitioners' motions, made at the close of the Government's case in chief, were based upon the Government's failure to present evidence showing the existence of an extension of credit as well as upon the argument that the statute was not intended by Congress to apply in the instant case. The court's desire to fabricate a governmental right to appeal as a matter of law adversely affected Petitioners' right to a Rule 29(a) acquittal based upon the failure of the Government to prove all of the elements of the crimes charged. A Rule 29(a) motion serves as a safe-

guard against defiicient prosecutions and is consistent with the principle that the Government carries the burden of proof. Where the trial court reserves ruling upon such a motion in total disregard for the mandatory nature of Rule 29(a), this procedural safeguard ceases to exist. Where the court further permits the jury to reach a verdict of guilty and then enters a judgment of acquittal upon the earlier Rule 29(a) motion, permitting the Government to appeal would render a defendant's Fifth Amendment rights subject to artificial differences in judicial timing.

To permit the Government to appeal in the instant case allows the trial court to contravene the mandate of Rule 29(a), and by so doing, permits appeals by the Government where none were contemplated or intended by Congress. The reservation of its ruling on Petitioners' Rule 29(a) motion solely to create a Government right to appeal further contravenes the intent and purpose of the 1970 amendments to Title 18, United States Code, §3731. By ignoring the procedural mandate of Rule 29(a), the trial court sought to remove Petitioners' right to raise the double jeopardy limitation upon the Government's right to appeal. This tactic affects a substantial right of Petitioners and constitutes plain error under Federal Rules of Criminal Procedure, Rule 52(b).

(3) The Court Of Appeals Has Decided An Important Question Of Federal Criminal Law Which Has Not Been, But Should Be, Settled By This Court.

Title 18, United States Code, §891 et seq, was enacted by Congress to stop the infiltration of organized crime and loan sharks into legitimate businesses. As such the language of the statute is, in the words of the Ninth Circuit, "broad in scope and impact." *United States* v *Andrino,* 501 F2d 1371, 1376 (9th Cir 1974). This scope is limited, however, to transactions entirely within the world of organized crime as well as "transactions between those within that worlds and those who are otherwise outside it." H. R. Rep. No. 1397, 90th Cong., 2d Sess. 31 (1968); 1968 U.S. Code Cong. and Admin. News 2028.

The findings of Congress in the preamble of the Act focus on the effects of loansharking on commerce in the United States. There is no mention of the activities of persons other than those involved with organized crime. Further, there is no indication in the legislative history of the Act that Congress meant the Act to cover the persons not involved in organized crime or loansharking. See H.R. Rep. No. 1397, 90th Cong. 2d Sess. 28-31; 114 Cong. Rec. 1605-1610. As a result, while the Act was meant to and does extend coverage beyond the classical loansharking case, it does not reach the efforts of a storeowner to obtain a confession of a theft from an employee.

Should this statute be held to have the overly broad scope suggested by the Government then whenever the owner of a small business confronts a customer or an employee, whom he believes to be a thief and obtains a confession and promise of restitution from him, the Government can bring him before the grand jury. In other words, the storeowner attempts to handle his problem without resort to the courts, so that the customer or employee is protected from unnecessary ridicule, he is committing a federal crime. The absurdity of this result is clear. Under the Government's interpretation, any citizen who uses the civil law concept of "self help" will be a criminal.

That is the position of your Petitioners. They utilized "self help" to protect Art Sklar from undue publicity so that he could obtain another job without having a "black mark" on his record. In return they were rewarded with being indicted and prosecuted. Unless the court acts now to remedy this situation, and holds that the Act does not reach actions usch as your Petitioners, countless citizens

will be branded criminals just because they tried to recover what they truly believed was owed them without resort to the courts.

(4) The Court Of Appeals Has So Far Departed From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of This Court's Power Of Supervision.

One of the two (2) grounds stated by the trial judge for the entry of a Judgment of Acquittal was that the Government failed to carry its burden of proof by presenting evidence from which the jury could have found, beyond a reasonable doubt, that Petitioners entered into an agreement to defer payment with respect to an obligation. He further held that the Government had not shown that attempts were made to collect an extension of credit within the statutory definition. In a footnote (note 17, p. 8) the Court of Appeals disposed of these findings. No indication was given by the Court of Appeals as to what it items in the record it supports its ruling.

The Court of Appeals was able to make this ruling only because of the trial court's procedural error which removed Petitioners' right to raise the Double Jeopardy Clause as a bar to a Government appeal under Title 18, United States Code, §3731. Without the benefit of this error the Government would have no right to appeal. *Burks* v *United States,* ..... US ....., 98 S Ct ....., 57 L Ed 2d 1, 7 (1978). The trial court's finding that the evidence presented by the Government was insufficient to sustain the jury verdict would therefore have been conclusive.

Further, the trial judge sits in the courtroom and in fact has the best vantage point for overseeing the trial proceedings. The appellate court, working from a dry transcript, is not in as good a position to view the evidence. As such the trial judge's ruling that the evidence was insufficient should not be overturned except upon a clear showing that the judge was in error. No such showing has been made in this case.

CONCLUSION

For the above reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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Dated: August 30, 1978

APPENDIX — A

No. 77-5174

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
v.
FRED CHEIMAN and NICHOLAS SARDELIS, JR.,
Defendants-Appellees.

APPEAL from the United States District Court for the Eastern District of Michigan

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Decided and Filed June 26, 1978.

Before: WEICK, CELEBREZZE and MERRITT, Circuit Judges.

MERRITT, Circuit Judge. The defendants were convicted of violating the 1968 Act prohibiting "extortionate credit transactions," 18 U.S.C. §§ 891-896, by threatening another with bodily harm for the purpose of collecting a false claim of indebtedness. The District Court set aside the jury verdict on grounds that the case "does not come within the class of activity Congress sought to prohibit," and the government appeals.

The principal question on appeal is whether the government must prove that the defendants not only violated the

express terms of the extortion statute but were also engaged in "loansharking" or "organized crime." We reverse on grounds that proof of loansharking or organized criminal activity is not a necessary element of the crime and that the proof was sufficient to establish that the defendant violated the express terms of the statute.

I. STATEMENT OF CASE

A. *The Purpose of the Act*

The Congressional purpose of the act proscribing "extortionate credit transactions," 18 U.S.C. §§ 891-896, was to enable federal authorities to strike at loansharking activities carried on by organized crime, and one of the bills considered in the House specifically limited its application to loansharking.[1] But Congress was unable to formulate an effective definition of "loansharking." One proposal defined "loansharking" as an attempt to collect loans which are usurious under state law, but others pointed out that legal interest rates vary widely from state to state while some states have no usury laws at all.[2] Finally, the Senate-House Conference Committee scrapped the idea altogether in favor of the more broadly worded, present version of the statute which makes no mention of loansharking.[3] Throughout the legislative process, however, the proponents of the bill continued to tout the bill as a much needed weapon to fight loansharking by organized crime.[4]

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[1] 114 Cong. Rec. 1605-1606 (1968).

[2] 114 Cong. Rec. 1608-1609 (1968).

[3] 114 Cong. Rec. 1609-1610 (1968).

[4] *See Perez* v. *United States*, 402 U.S. 146, 149, 155-156 (1971).

Rather than attempting to define particularly those crimes and criminals at which the bill was aimed, Congress in the final version of the Act outlaws three general kinds of extortion:

1. An "extortionate extension of credit," defined as an "extension of credit" which the creditor and the debtor "understand" may be collected by "the use of violence or other criminal means to cause harm to the person, reputation or property of any person." 18 U.S.C. §§ 891(6), 892.

2. An "advance" of money to another person for use in financing "extortionate extensions of credit." 18 U.S.C. §893.

3. An "attempt to collect" any debt or claim, "whether acknowledged or disputed, valid or invalid, and however arising" by using "any extortionate means," which is defined as "any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person." 18 U.S.C. §§ 891(1), (6), 894.

The text of the Act does not require proof of loansharking nor does it require any showing that the defendant's conduct in some way affected or involved interstate commerce. Congress found, rather, that extortion, by its very nature, affects interstate commerce, making every incident of extortion a federal offense because, "Even where extortionate credit transactions are purely intrastate in character they nevertheless directly affect interstate and foreign

commerce."[5] Section 894, under which defendants were prosecuted, therefore encompasses virtually any crime involving the use of extortion to collect a debt or claim, however that claim arises.

In passing the Extortionate Credit Act, Congress was well aware that the statute infringed upon areas traditionally left to state juridiction. Some Congressmen opposed the Act on grounds that it interfered unnecessarily with the rights of the states. For example, Congressman Eckhardt argued on the floor: "Should it become law, the amendment would take a long stride by the Federal Government toward occupying the field of general criminal law and toward exercising a general Federal police power; and it would permit prosecution in Federal as well as State courts of a typically State offense."[6] Eckhardt's objections were overridden by the majority, however, who apparently believed that the states were unable to combat effectively loansharking activities by organized crime.[7]

B. *The Conduct of the Defendants*

The defendants were convicted under §894 of attempting to collect a claim by threats of violence. The record discloses no substantial evidence of loansharking or organized criminal activity.

Defendant, Cheiman, a pharmacist, was a part owner of three drug stores in the metropolitan Detroit area, including the Medi-Mart store in Bloomfield Hills, Michigan. In

[5] Title II of the Consumer Credit Protection Act, Pub. L. No. 90-321, §201(a)(3), 82 Stat. 159, *reprinted in Perez v. United States, supra*, at 147 n. 1.

[6] 114 Cong. Rec. 1610.

[7] *Id.*, at 14490.

September, 1974, Cheiman hired Art Sklar, a pharamacist who had managed other drug stores, to run the Medi-Mart store. It was understood that if both parties were agreeable Sklar might later buy a quarter interest in the store for $15,000 to $18,000. In October, Cheiman threatened to fire Sklar if Sklar refused to invest in the operation. Sklar, whose paychecks had bounced twice, decided not to invest in the financially troubled pharmacy but did not tell Cheiman.

Approximately two weeks after Cheiman's threat, Sklar was working at Medi-Mart when a female employee told him that a toilet was overflowing in a back room. Sklar hurried to the room only to find himself trapped there by Cheiman and two other men, defendant Sardelis and Weiczorek (an unindicted co-conspirator). Holding a paper bag of drugs, Cheiman accused Sklar of attempting to steal the drugs from the pharmacy. When Sklar denied the charges, Sardelis, a recent law school graduate who had formerly been a bill collector, grabbed Sklar around the neck and pushed him, then began to tap him on the shoulder with a baseball bat. When Sklar again refused to admit any theft, Sardelis pulled out a revolver, pointed it at Sklar's chest and showed him a bullet. Sardelis said it was a soft lead bullet which "goes in very small but comes out real big." Frightened, Sklar then signed a typed "confession" produced by Cheiman, stating that Sklar had stolen a total of $7,000 worth of drugs from Medi-Mart (a bag each day since Sklar had started working there) and that he would make full restitution of the amount. The men also forced Sklar to write a check for $7,000 to Medi-Mart; and Sardelis took $20 to $30, an American Express Card, and a driver's license from Sklar's wallet. Finally, Cheiman told Sklar that if he did not pay the $7,000 within a week that Sklar would be hearing from Sardelis. Sardelis also threatened that if Sklar refused to pay or went

to the police that Sardelis might harm Sklar's family and would prevent him from keeping any job with another pharmacy.

Sklar, who immediately contacted an attorney, the F.B.I., and the Detroit Police Department, later telephoned Cheiman several times trying to learn the identity of Sardelis whom the others had referred to only as "Nicky." Cheiman refused to say, telling Sklar, "I don't want nothing further to do with him. I had to get off the hook and I'm off the hook. You're on it." On November 12, Sardelis called Sklar's home and told Sklar's son that his father's time was about up. On November 14, Sardelis called again, telling Sklar's wife, "You can just tell Art he had better make good on his debts real quick."

Cheiman and Sardelis were each convicted of one count of violating §894 for threatening Sklar in the back room of the pharmacy. Sardelis was also convicted in a separate count for his threatening telephone call to Sklar's wife on November 14.

II. APPLICATION OF THE STATUTE TO DEFENDANTS' CONDUCT

The basic question here is whether the statute should be interpreted broadly according to its text, its so-called "plain meaning," or narrowly according to "the equity of the statute." As Chief Justice Bromley said in 1554, "The judges who were our predecessors have sometimes expounded the words quite contrary to the text . . . in order to make them agree with reason and equity."[8] The Supreme Court has indicated, however, in two recent cases, *United States* v. *Culbert*[9] and *Perez* v. *United States*,[10] that a statute like this one should be applied according to its text without using rules of statutory construction to add elements to the crime or contract its coverage.

[8] *Fulmerston* v. *Steward*, (1554) Plowd. 109. *See* Plucknett, *A Concise History of the Common Law*, 334 (5th Ed. 1956); S. Thorne, *A Discourse on the Exposition & Understanding of Statutes*, 77-79 (1942).

In *Culbert*, the Supreme Court this term, in a unanimous opinion by Justice Marshall, refused to narrow the text of another extortion statute, the Hobbs Act,[11] also aimed at organized crime. Finding the meaning of the statute clear from the text, the Court overruled decisions of this Circuit and the Ninth Circuit holding that conviction under the Act required proof of "racketeering." "It is inconceivable," the Court said, "that, at the time Congress was so concerned about clearly defining the acts prohibited under the bill, it intended to make proof of racketeering — a term not mentioned in the statute — a separate prerequisite to criminal liability under the Hobbs Act."[12]

[9] ..... U.S. ....., 42 U.S.L.W. 4259 (U.S. March 28, 1978) (No. 77-142).

[10] 402 U.S. 146 (1971).

[11] The Hobbs Act, 18 U.S.C. §1951, provides in pertinent part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

[12] 46 U.S.L.W. at 4261.

Similarly, the Extortionate Credit Act whose terms were intended to encompass a broad scope of criminal activity, does not make proof of loansharking, organized crime or racketeering "a separate prerequisite to criminal liability."

In *Perez* v. *United States*, the defendant attacked the constitutionality of the Extortionate Credit Act on the grounds that Congress had no power under the Commerce Clause to make a federal offense of purely intrastate activity. As previously pointed out, the statute makes it unnecessary to prove the use of interstate facilities or any effect on interstate commerce. Justice Douglas, writing for the majority, declined to read into the statute any jurisdictional requirements concerning the effect on interstate commerce and upheld the statute on the basis of Congressional findings that, as a class of activities, extortionate credit transactions have an inherent impact on interstate commerce. Extortion "in its national setting is one way organized interstate crime holds its guns to the heads of the poor and rich alike and siphons funds from numerous localities to finance its national operations."[13] Justice Stewart dissented "because I am unable to discern any rational distinction between loansharking and other local crime," concluding that "the definition and prosecution of local intrastate crime are reserved to the states under the Ninth and Tenth Amendments."[14]

A reading of these two cases, *Culbert* and *Perez*, leads us to the conclusion that federal courts may not read into this extortion statute additional elements requiring proof of loansharking, organized crime or interstate commerce.

[13] *Perez* v. *United States*, *supra*, at 157.

[14] *Id.* at 158.

No federal appellate court has been willing to read such a requirement into the statute.[15] Although the effect of this reading is to permit virtually plenary federal jurisdiction over extortionate debt collection practices, Congress has precluded the courts from constructing jurisdictional limitations on the statute and committed to administrative discretion the responsibility of reasonable enforcement of the Act.

The basis for the federal, as distinguished from the local, interest in prosecuting this case does not appear from the record, and we join the District Judge in questioning the wisdom of a statute which vests unguided discretion in federal prosecutors over local offenses without the limitations of statutory or administrative standards.[16] But Congress has expressed its purpose in a clear statute, the constitutionality of which is no longer in question; and the principle of legislative supremacy requires us to enforce the statutory language. The judgment of the District Court is therefore reversed and the case is remanded with in-

[15] *United States* v. *Sears*, 544 F.2d 585 (2nd Cir. 1976) (case involving loan between two friends characterized as "trivial"); *United States* v. *Keresty* ,465 F.2d 36 (3rd Cir. 1972), *cert. denied*, 409 U.S. 991 (dice game); *United States* v. *Schaffer*, 539 F.2d 653 (8th Cir. 1976) (gambling); *United States* v. *Andrino*, 501 F.2d 1373 (9th Cir. 1974) (debts arising from gin rummy game); *United States* v. *Briola*, 465 F.2d 1018 (10th Cir. 1972), *cert. denied*, 409 U.S. 1108 (1973).

[16] Davis, *Discretionary Justice* 60-74 (1976).

structions for the District Court to reinstate the jury verdict and proceed with sentencing.[17]

[17] The defendants' secondary argument is that there was never a debt and therefore no "extension of credit" within the meaning of §891(1). This argument is insubstantial. An admission of robbery is not a good defense against a charge of extortion. The defendants forced Sklar to sign an agreement to pay a false claim in the future. Then, on the same day and in an attempt to collect the claim, the defendants forced Sklar to sign a check, gave him a deadline to make the check good, and attempted to collect on the check by implied threats of physical harm.

Neither is there any substance to defendants' double jeopardy argument. The District Judge set the verdict aside as a matter of law on motion in arrest of judgment. There will only be one trial for the same offense. There is no risk of reprosecution. The Supreme Court has answered this argument in *United States* v. *Scott,* ..... U.S. ....., 46 U.S.L.W. 4653, 4655 (U.S. June 13, 1978 (No. 76-1382).

APPENDIX — B
(Filed August 18, 1978)

No. 77-5174

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v. ORDER

FRED CHEIMAN and NICHOLAS SARDELIS, JR.,

Defendants-Appellees.

Before: WEICK, CELEBREZZE and MERRITT, Circuit Judges.

Upon consideration of the petition for rehearing filed herein by defendants-appellees, the Court concludes that all of the questions addressed in the petition for rehearing were fully considered upon the original submission and decision of this case.

It is therefore ORDERED that the petition for rehearing be and it hereby is denied.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

By (s) Grace Keller, Chief Deputy

APPENDIX — C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,
v.
Criminal No. 4-83040

FRED CHEIMAN and
NICHOLAS SARDELIS, JR.,
Defendants.

JUDGMENT

The jury having brought in a verdict finding defendant Fred Cheiman guilty as to Count II and not guilty as to Counts I and III, and the jury having found defendant Nicholas Sardelis, Jr., guilty on Counts II and III and not guilty on Count I; and the defendants having made a motion for judgment of acquittal at the close of all the evidence, pursuant to Rule 29 of the Fed. R. Crim. P.; and the court having reserved decision on defendants' motion until after the return of the verdict of guilty by the jury; and the court being of the view that the facts presented and the court ruling as a matter of law that an attempt to obtain restitution for a theft does not constitute a violation of 18 U.S.C. §894, *cf. United States* v. *Yokely,* 20 BNA Crim.L.Rep. 2015 (Sept. 13, 1976);

NOW, THEREFORE, IT IS ORDERED AND ADJUDGED that said verdict on Count II as to defendant Cheiman and Counts II and III as to defendant Sardelis be set aside and judgment of acquittal be entered in favor of each defendant.

(s) Robert E. DeMascio
United States District Judge

Dated: January 11, 1977

Pursuant to Rule 77(d), Fed. R. C.V. P. copies mailed to attorneys for all parties on January 11th, 1977.

(s) Lorileen Don
Deputy Court Clerk

APPENDIX — D

(2)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,
v. Criminal No. 4-83040
FRED CHEIMAN and
NICHOLAS SARDELIS, JR.,
Defendants.

Wednesday, December 15, 1976
Detroit, Michigan
2:45 p.m.

ORAL OPINION

MR. PERLOVE: Your Honor, at this time, we would ask whether the Court is prepared to rule upon those motions which it has taken under advisement?

THE COURT: Yes. The Court has under advisement, two motions. One motion for a judgment of acquittal; and now, being a judgment or motion for arrest of judgment on the ground that the Section 894 is not applicable to the facts in this case.

As to that motion, the Court will grant the motion as to both Defendants on all counts as a matter of law.

The Court rules that an attempt to obtain restitution for theft, even if done by extortionate means, does not constitute a violation of 18 U.S.C., Section 894. The Court is cognizant of the fact that in *Perez* v. *United States*, 402 U.S. 146, the Court upheld the constitutionality of §894 stating grounds that Congress was concerned with loansharking, a purely intrastate activity, because of its effect on interstate commerce. Moreover, the Court held (3) that the method adopted by Congress to prohibit a class of activities, was constitutionally proper. A class of activities prohibited by Congress, that is use of extortionate means to collect an extension of credit, was broadly drafted. An extension of credit is defined as indicated on the blackboard by the Government; namely, "To extend credit means to enter into an agreement, tacit or express, whereby the re-payment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred."

We are aware that a number of Courts have, based on this broad language, sustained convictions under §894 in many varied situations. For example, see *United States* v. *Briola*, 465 F.2d, 1018, a Tenth Circuit case decided in 1972, which is the collection of a gambling debt.

Counsel for the Government has also informed this Court of various unreported decisions in which the debts arose from non-traditional loan operations. For example, he points to the situation where there was fabricated some demand by various persons for sums of pay-off money to certain police officers for protection. This Court realizes, however, that the class of activities Congress sought to prohibit is indeed broad. Nevertheless, in our view, the outer limits of that class of activity must be defined. We, ac-

cordingly, rule as a matter of law that the efforts of any Defendant (4) to gain restitution from one who the Defendant believes stole from him, cannot and does not come within the class of activity which Congress sought to prohibit.

The Government further relies on the *United States* v. *Annerino,* 495 F.2d, 1159, a Seventh Circuit case. This Court finds that case clearly distinguishable. The evidence in that case indicated that one Defendant assigned a debt owed to him by the victim as collateral for a loan. The assignees used threats of violence to collect the debt. The assignor participated in those threats. In that case the Court held that the fact that the underlying debt arose through the misappropriation of partnership funds and misuse of credit card was irrelevant. We believe this is so because the claim was assigned. In the hands of the assignee, it does not matter from what the underlying debt arose. The facts in the instant case show a shopkeeper attempting to recover what he believes was stolen from him by a dishonest employee. This does not even approach, in our view, the situation presented in *Annerino.*

We might even indicate that if the statute were to apply to a situation such as has been displayed by the evidence presented here, this Court would be forced to conclude, as applied, the statute would be unconstitutional.

(5)

In *Perez,* the Court relied on its prior holding in *Katzenback* v. *McKlung,* that a statute is valid under the commerce clause where Congress attacks a class of activity after appropriately considering the total incidence of the practice on commerce. The total incidence on commerce of a practice of collecting from one who has stolen is nil. And you could never consider that Congress, in enacting

the statute, had in mind that one who attempts to collect a debt, or one who attempts to obtain restitution from one who he believes has stolen, would ever be included within the statute. The history of the statute indicates that Congress broadly defined the extension of credit to avoid any potential loopholes in its enforcement scheme, see for example, the Conference Reports of the 90th Congress in the Second Session, Report Number 1397, found in the 1968 United States Code, Congressional and Administrative News at pages 2021 and 2028. Our interpretation that the efforts made by the Defendant, who has a bona fide belief that someone had stolen from him, to obtain restitution, is not covered by the statute. Hence, we avoid the constitutional issue.

Now, the jury verdict here is quite interesting. It is clear that the jury could not find either Defendant guilty of a conspiracy. Now, in the Court's view, just examining the evidence, that is quite explainable. (6) Although no counsel thought of it in his closing argument, the Government indicated in writing the definition of extension of credit on the board, that it would erase the word "debt", and in doing so, the Government stated that it did not believe that this was a debt, because a debt is something that implies more. It implies an underlying loan. But interestingly enough, although the Government struck the word "debt" from the definition of extension of credit, Count One in the indictment, which is the conspiracy count, contains this language. It is part of the conspiracy, says the indictment, that Fred Cheiman would employ Nicholas Sardelis to collect an alleged debt owed by Arthur Sklar by threatening to use violence and other criminal means.

Paragraph three says it was a further part of the conspiracy that Defendants Fred Cheiman and Nicholas Sardelis would force Arthur Sklar to sign an I.O.U. and then obtain payment of the alleged debt.

Similarly, in paragraph four, there is a reference to the fact that it was part of the conspiracy that Defendant Nicholas Sardelis would make threatening telephone calls to the home of Arthur Sklar to encourage payment of an alleged debt. With an indictment that reads in that fashion as to the conspiracy count, it is quite explainable to the Court that the jury could not find the Defendant, or either of (7) them guilty of the conspiracy.

Interestingly enough, the jury further finds one Defendant, Cheiman, guilty of Count Two, but not guilty of Count Three. And it finds the Defendant Sardelis guilty of both counts. Not having found a conspiracy, as this Court indicated it was troubled about that point right after the opening statement, the jury has concluded, without finding a conspiracy, then it could not find Defendant Cheiman guilty of Count Three because in order to do so, Count Three would have to relate back to some conspiracy by him. But the record is devoid of any evidence that Cheiman did anything after November 6, yet the jury found the Defendant Sardelis guilty of Count Two and Count Three.

In our view, even accepting the Government's theory that this case is within the class of activities covered by the statute, the Defendants would still have to be acquitted. The Government has, as a matter of law, failed to sustain its burden of proof to establish an extension of credit. We have already explained how Count One first began, characterizing the extension of credit as a debt. That theory was entirely changed during the course of the trial. It was no longer a debt. It became a claim. And it became a claim under circumstances where the Government indicated that it would not dispute the fact that the Defendants believed, (8) or acted as though they were claiming restitution whereas the Government indicated it would not admit,

and did not admit at anytime, that Arthur Sklar did, in fact, steal.

In any event, it is clear in this record there is no evidence of an agreement to defer payment on the obligation. There is no evidence of an agreement with respect to the obligation. The evidence, when taken in the light most favorable to the Government, shows that the Defendants extracted a confession from the victim.

Arthur Sklar testified that immediately after signing the confession, he retracted it and told Defendants that he owed them nothing; that the Defendants did not consider this confession an agreement to repay, whether express or implied, tacit or expressed, is clearly evidenced by the tape recording introduced by the Government.

Defendant Cheiman repeatedly told victim Sklar that he, that is Sklar, should state just how much money and merchandise he stole. Cheiman was clearly attempting to get Sklar to make restitution and clearly did not have any agreement from Sklar that he would do so. But in any event, as to Counts Two and Three, in order to come within the definition of an extension of credit, the Government must show that there was, in fact, an agreement to defer payment. Before they could come into the statute, the events of (9) November 6 would have had to occur, because as of November 6, all the evidence shows is that they obtained, in a light most favorable to the Government, the agreement. The jury would have to find that the tapes disclosed evidence that there was an attempt to collect on that agreement. But it is quite clear that Exhibit 1, which the Government relied upon, is not an agreement. It is a confession. It cannot be called an agreement to fall within the terms of extension of credit. In any event, even if the Government is correct that there is sufficient evidence of

an agreement to repay, the judgment of acquittal would still have to be granted.

The Defendants have been acquitted of Count One, and properly so, because in the Court's view, with respect to Count One, there is no evidence of a conspiracy to use extortionate means to collect a debt; and that is what the indictment charges. On that point, we refer counsel to an Opinion we recently wrote, soon to be published, *United States versus Emler*. There, we sustained the Government's position that the Government had not changed its theory of the evidence presented to the Grand Jury and then come up with a different theory of evidence at trial. But in this case, the evidence presented to the Grand Jury was evidence that this was a debt. And they so characterized in the indictment. But that theory changed because during the course of the trial, the word "debt" (10) was stricken from the definition. And there was an acknowledgment that it was not a debt, nor could it ever be classified as a debt. And on that point, the Government's own witness, the co-conspirator, who was granted immunity to testify that the only matter discussed was a lawful confrontation with Arthur Sklar to get him to admit the theft. Although we agree that common action will permit an inference of conspiracy, we are hard put to find any common action from the evidence presented here. Although Sklar and Wiczorek testified that the Defendant, Sardelis, used extortionate means, there is no evidence that we can discern that Defendant Cheiman knew of Defendant Sardelis's actions. All the witness testified that when the alleged threats were made, Cheiman was not present. Moreover, the Government's tape recordings consistently indicate the references by Sklar to the use of guns and violence responded to by Cheiman to the effect that he does not know what Sklar is talking about.

In our view then, Count Two must be dismissed. The evidence, when viewed most favorable to the Government, only establishes the use of extortionate means, as we have said, to obtain an agreement, if you can call Exhibit 1 an agreement to repay the $7,000, but not to collect on that agreement. All versions of the incidents of November 6, indicate that immediately after the confession and the check were (11) obtained, Sklar left the premises. There were just no efforts made to collect, by extortionate means or otherwise, upon the check or the Government's Exhibit 1.

We need not comment on Count Three as it pertains to Defendant Cheiman because the jury has already concluded that as a result.

Thus, to summarize, the Court holds first, that as a matter of law, the offense charged and proved does not fit within 18 U.S.C., Section 894.

Secondly, we hold that assuming arguendo, that the Government's theory of law is correct, there is insufficient evidence to support a jury finding that beyond a reasonable doubt there was an agreement for a deferral of, or the repayment or satisfaction of a debt or a claim.

Have your clients step forward.

MR. PERLOVE: Yes, your Honor.

THE COURT: I have done a lot of work on this case, and I assure you that it was not for any benefit of yours, or yours, Mr. Cheiman. It was sheerly out of the Court's conscience to properly apply the law as the Court saw it. But your conduct, Mr. Sardelis, I wish to tell you, is despicable. I do not know whether there is any truth in any of your testimony. I began to view your testimony with great suspicion when you concocted that story about what happened (12) to the gun and the gun falling out. But then, when you saw fit to accuse FBI agents of using scur-

rilous and impertinent and disgusting religious statements as you did, I just thought I could not let you leave this courtroom without letting you know that to this Court, it was disgusting. And I came so close to holding you in contempt that you will never know just how close I came because there was no need for you to use that obscene and scurrilous language from the stand. Anyone that observed your testimony clearly recognized that you were finding pleasure in using that language. And I wish to state on behalf of the FBI agents, that there is no question in this Court's mind that they never used such scurrilous language referring to the religion of one of the Defendants in this case. That finding is so clear here that I would be less than honest if I did not indicate to you that so far as this Court is concerned, it takes that testimony as totally fabricated. And it is terrible coming from a young man such as you, who aspires to be a lawyer and an officer of the court. I just do not understand it. As I have indicated to you earlier, as you go along in life, you may be relieved by the ultimate result of this case, dictated only by the Court's understanding of the law. But I trust you will never look back at this trial with any sense of pride, not in the testimony you gave.

The Defendants are discharged and this Court is adjourned.

No. 78-423

In the Supreme Court of the United States

OCTOBER TERM, 1978

FRED CHEIMAN and NICHOLAS SARDELIS, JR., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1978

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FRED CHEIMAN and NICHOLAS SARDELIS, JR., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 578 F. 2d 160.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 1978, and a petition for rehearing was denied on August 18, 1978. The petition for a writ of certiorari was filed on September 13, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government may appeal a judgment of acquittal entered after the jury has returned a guilty verdict.

2. Whether the district court improperly deferred ruling on petitioners' motion for a judgment of acquittal.

3. Whether collection of an extension of credit by extortionate means, in violation of 18 U.S.C. 894(a)(1), requires proof of "loansharking" or connection with organized crime.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner Cheiman was convicted on one count and petitioner Sardelis on two counts of attempting to collect an extension of credit by extortionate means, in violation of 18 U.S.C. 894(a)(1).

1. The evidence at trial showed that petitioner Cheiman was part-owner of a drug store, which had incurred operating losses of close to $9,000 between its opening on March 4, 1974, and August 31, 1974. In September 1974 Cheiman hired Arthur Sklar to work as a pharmacist on the understanding that Sklar might later buy a 25% interest in the store for $15,000 to $18,000, if both agreed. In October, Cheiman threatened to fire Sklar if he did not invest in the operation. Two of Sklar's paychecks bounced and Sklar decided not to invest, but he did not tell Cheiman (Tr. 30-36, 213, 219; Pet. App. 5a).

On November 3, 1974, in response to written instructions left by one of Cheiman's partners, Sklar prepared a package of pharmaceuticals for transfer to another of Cheiman's stores and placed the package, worth between $100 and $200, on a shelf beneath the pharmacy counter. That evening Cheiman told Janice Lefton, an employee at the pharmacy, to "[k]eep her eyes opened," which she interpreted to mean that she should watch Sklar. Lefton noticed the package of pharmaceuticals and showed it to Cheiman (Tr. 55-56, 513-514, 570-575).

On November 6, 1974, Cheiman told petitioner Sardelis and another man that he suspected Sklar of stealing from

his store. The three men confronted Sklar with the package of pharmaceuticals in a back room of the store and accused him of stealing $7,000 worth of drugs.[1] Sklar denied the accusation. At that point Sardelis, whom Sklar had never seen before, grabbed Sklar around the neck, pushed him, and tapped him on the shoulder with a baseball bat. Cheiman demanded that Sklar sign a paper previously drafted by Cheiman in which Sklar would admit to having stolen $7,000 worth of drugs and promise to "make full restitution for said sum, either by return of the drugs or full cash payment for same" (Gov't Exh. 1, Tr. 64). When Sklar refused, Sardelis pointed a gun at Sklar's chest and showed Sklar a bullet, saying that it was a soft lead bullet and "that it goes in very small but it comes out real big" (Tr. 59-60, 259-261). Frightened, Sklar signed the note and also made out a check for $7,000, although he told petitioners that he did not have funds to cover the check. Sardelis took $20 to $30, an American Express card, and a driver's license from Sklar's wallet. Sardelis told Sklar that he could help him obtain a mortgage to pay the $7,000 and warned that if he went to the police or did not pay, Sardelis might harm Sklar's family and would prevent Sklar from keeping any job with another pharmacy. Cheiman fired Sklar and told Sklar that if he did not pay within a week he would hear from them (Tr. 58-65, 242-250; Pet. App. 5a-6a).

Thereafter Cheiman spoke to Sklar by phone on several occasions and said that the matter was now out of his hands and had been turned over to "Nick."[2] Cheiman

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[1]After his arrest Cheiman admitted that he had no idea how much Sklar had taken and could not explain how he arrived at the $7,000 figure (Tr. 375-379).

[2]Cheiman also told Sklar that the other investors in the pharmacy wanted to know why they were losing money, and that in response Cheiman had explained that Sklar was a thief. He told Sklar, "I'm off the hook. You're on it" (Pet. App. 6a).

always refused to tell Sklar what Sardelis' surname was (Pet. App. 6a).

On November 12, 1974, Sardelis called Sklar's home and told Sklar's son that Sklar's time was about up. On November 14, Sardelis called again and this time spoke to Sklar's wife. He warned: "You can just tell Art he had better make good on his debts real quick" (*ibid.*).

2. The jury convicted both petitioners of attempting to collect an extension of credit by extortionate means on November 6, 1974, and convicted Sardelis alone of committing the same offense on November 14, 1974.[3]

The district court thereafter set aside the verdicts on the ground (1) that attempts to obtain restitution for a theft are not, as a matter of law, prohibited by 18 U.S.C. 894 and (2) that the evidence of an agreement to pay and of attempts to collect the debt was, in any event, insufficient to support the verdict. The court of appeals reversed. It held that petitioners' conduct was prohibited by 18 U.S.C. 894; the court refused to read into the statute a requirement that petitioners must be loansharks or members of organized crime (Pet. App. 4a, 6a-9a). It also held petitioners' argument attacking the sufficiency of the evidence to be "insubstantial" (Pet. App. 10a n.17).

ARGUMENT

1. Petitioners first contend (Pet. 12-14) that the Double Jeopardy Clause precludes the government's appeal in this case.

The Double Jeopardy Clause is primarily directed at the threat of multiple prosecutions and does not bar government appeals where a new trial or other fact-finding proceedings would not be required if the government prevailed on appeal. *United States* v. *Scott*,

[3]Petitioners were acquitted on the conspiracy count (Pet. App. 17a).

No. 76-1382 (June 14, 1978), slip op. 3, 8 & n.7; *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 569-570 (1977); *United States* v. *Jenkins*, 420 U.S. 358, 365, 370 (1975). Where, as here, "reversal on appeal * * * * merely reinstate[d] the jury's verdict * * *," *United States* v. *Wilson*, 420 U.S. 332, 344-345 (1975), and did not give the prosecution a second opportunity to supply evidence (*Burks* v. *United States*, No. 76-6528 (June 14, 1978), slip op. 16), the Double Jeopardy Clause does not bar the appeal.

The appealability of judgments of acquittal entered after a guilty verdict has been rendered is also uniformly supported by the decisions of the courts of appeals. See, *e.g.*, *United States* v. *Schoenhut*, 576 F. 2d 1010 (3d Cir.), cert. denied, No. 78-13 (Nov. 13, 1978);[4] *United States* v. *Burroughs*, 564 F. 2d 1111, 1117-1119 (4th Cir. 1977); *United States* v. *Ramos*, 558 F. 2d 545, 546 (9th Cir. 1977); *United States* v. *Hemphill*, 544 F. 2d 341, 343 (8th Cir. 1976), cert. denied, 430 U.S. 967 (1977); *United States* v. *Cravero*, 530 F. 2d 666, 670-671 (5th Cir. 1976); *United States* v. *De Garces*, 518 F. 2d 1156, 1159 (2d Cir. 1975).

2. Petitioners moved for a judgment of acquittal on all three counts at the close of the government's case in chief. They now contend (Pet. 14-16) that the district court improperly reserved ruling on this motion until the jury reached its verdict, in violation of Fed. R. Crim. P. 29(a).[5]

[4]Contrary to petitioners' assertion (Pet. 14), this case has not "been docketed for decision" by this Court.

[5]Rule 29(a) provides in relevant part:

> The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses.

But the court did rule on the sufficiency of the evidence to support the substantive counts, denying petitioners' motions as to Counts 2 and 3 (Tr. 451; see also Tr. 444-445). It adopted, for purposes of its ruling, the government's construction of 18 U.S.C. 894, that proof of loansharking or organized crime connections is not required by the statute (discussed in point 3, *infra*).

While the court did reserve a ruling on the correctness of the government's construction of the statute (Tr. 451), petitioners did not object to this delayed ruling on the government's legal theory. They therefore can now complain at most of plain error. And since the court of appeals ultimately determined that the government's construction of the statute was correct, petitioners in fact received a timely ruling applying the correct legal theory. They suffered no injury[6] other than the loss of an unjust ruling in their favor,[7] and they accordingly have no cognizable grievance regarding the reasonable approach adopted by the district court, which comported with that approved by this Court in *Scott, supra* (slip op. 17 n.13) and *United States* v. *Ceccolini*, 435 U.S. 268, 271 (1978).

3. Petitioners concede that 18 U.S.C. 894 "was meant to and does extend coverage beyond the classical loansharking case" (Pet. 17) but argue (Pet. 16-18) that in

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[6]Petitioners claim injury because the government could not have appealed the trial court's decision if the court had decided the legal issue against the government, and entered a judgment of acquittal, at the time of their initial motion. But petitioners' claim amounts only to a complaint that they were denied the benefit of an erroneous ruling of law to which they can hardly claim a legal right.

[7]The court also deferred ruling on the sufficiency of the evidence as to the conspiracy count. But since petitioners were both acquitted on that count, the propriety of the court's action is no longer at issue. Petitioners do not contend that the evidence offered after the reservation of the issue on Count 1 somehow improperly affected the jury's deliberations on the other counts.

this case the court of appeals improperly applied the statute to "the owner of a small business [who] confronts a customer or an employee, whom he believes to be a thief and obtains a confession and [a] promise of restitution from him." The short answer to this contention is that while the statute probably does not apply to the case posited by petitioners, that hypothetical is not this case.

Petitioners did not simply obtain a "confession" and a promise of payment; they used "extortionate means" to attempt to collect from Sklar, including not only verbal threats but also threats with a baseball bat and a gun. This clearly brought petitioners within the statute, which prohibits "knowingly participat[ing] in any way, or conspir[ing] to do so, in the use of any extortionate means (1) to collect or attempt to collect any extension of credit * * *." 18 U.S.C. 894(a). "Extortionate means" is defined as "any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person." 18 U.S.C. 891(7).

Contrary to petitioners' suggestion (Pet. 16-17), the government need not show involvement of organized crime in the transaction. As is the case with the Hobbs Act, 18 U.S.C. 1951, which this Court recently construed in *United States* v. *Culbert*, 435 U.S. 371 (1978), and which also prohibits extortionate transactions, "[n]othing on the face of the statute suggests a congressional intent to limit its coverage to persons who have engaged" in racketeering (*id.* at 373). To the contrary, the statutory language "sweeps within it" (*ibid.*) all persons who have "in any way" participated in the use of any extortionate means to collect an extension of credit. As with the Hobbs Act, the statute here "carefully defines its key terms" (*ibid.*), such as "exten[sion of] credit," "collect[ion of] extension of credit," and "extortionate means." 18 U.S.C. 891(1), (5), (7). Congress has "conveyed its purpose clearly," and there is no need "to limit the

statute's scope by reference to an undefined category of conduct" (*United States* v. *Culbert*, *supra*, 435 U.S. at 379, 380) such as loansharking or organized crime connections.[8]

The legislative history of 18 U.S.C. 894 shows that Congress did not intend to limit the statute to loansharking. An amendment offered by Congressman Poff that would have defined the offense of extortionate collection of loans in terms of loansharking (see 114 Cong. Rec. 1606 (1968)) was adopted by the House (*id.* at 1610), but the reference to loansharking was omitted by the conferees. See H.R. Rep. No. 1397, 90th Cong., 2d Sess. 10 (1968). See also *Perez* v. *United States*, 402 U.S. 146, 149 (1971). And there is no indication that Congress required a showing of connection with "organized crime," whatever that may include.[9] Rather, Congress was well aware that the statute would not be confined to interstate transactions but would permit "prosecution in Federal as well as State courts of a typically State offense." 114 Cong. Rec. 1610 (remarks of Rep. Eckhardt).

The court below therefore was correct in following the other courts that have considered the question and declining to read a requirement of loansharking or connections with organized crime into the statute. See, *e.g.*, *United States* v. *Annerino*, 495 F. 2d 1159, 1164-1165 (7th Cir. 1974); *United States* v. *Bonanno*, 467 F. 2d 14, 16-17 (9th Cir. 1972), cert. denied, 410 U.S. 909 (1973);

[8]As this Court noted in *Culbert*, when the Congress wanted to make racketeering an element of an offense, as in 18 U.S.C. 1961 *et seq.*, it knew how to do so. See 435 U.S. at 378 n.9.

[9]As was the case in *Culbert*, if the courts read in a requirement of loansharking or organized crime connections in the absence of a statutory definition of such language, the result might be a statute whose meaning was so vague as to be constitutionally defective. *United States* v. *Culbert*, *supra*, 435 U.S. at 374.

United States v. *Briola*, 465 F. 2d 1018 (10th Cir. 1972), cert. denied, 409 U.S. 1108 (1973); *United States* v. *Keresty*, 465 F. 2d 36 (3d Cir.), cert. denied, 409 U.S. 991 (1972); cf. *United States* v. *Sears*, 544 F. 2d 585 (2d Cir. 1976).[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1978

[10]Petitioners contend (Pet. 18-19) that the court of appeals should not have reversed the trial court's rulings that the government had presented insufficient evidence of an agreement to defer payment and of an attempt to collect the debt by extortionate means.

The court of appeals was correct in rejecting petitioners' arguments as to the strength of the evidence as "insubstantial" (Pet. App. 10a n.17). The statute covers an agreement to defer payment of claims whether the claims are acknowledged or disputed, valid or invalid (18 U.S.C. 891(1)). Here, Sklar and petitioners agreed to defer payment of a claim, and the fact that Sklar disputed the validity of the claim is not material. Similarly, the record clearly shows attempt to collect the debt by "express or implicit threat of use, of violence" (18 U.S.C. 891(7)); threats were made both immediately after Sklar agreed to pay petitioners on November 6 and during subsequent telephone conversations between petitioner Sardelis and Sklar and Sklar's wife.

DOJ-1978-11

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978
No: 78-423

FRED CHEIMAN AND NICHOLAS SARDELIS, JR.,
Petitioners

-VS-

UNITED STATES OF AMERICA,
Respondent.

PETITIONERS' REPLY TO GOVERNMENT'S RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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CITATIONS

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The Government contends that the trial court took only questions of law under advisement under Petitioners' Rule 29(a) motion. A careful review of the transcript of the trial indicates that no express ruling was made by the court upon that portion of Petitioners' Rule 29(a) motion which requested a judgment of acquittal based upon the fact that the Government failed to present sufficient evidence to show that an extension of credit, as defined by Title 18, United States Code, §891, was made. Petitioners submit that failure to issue an express ruling on this question, when coupled

with the Court having taken under advisement the question of law, constitutes the taking under advisement of this crucial question of fact.

That being the case:

> "A court may not properly take action in a cause while an undetermined motion is pending before it unless the subsequent determination of the motion either way cannot affect the validity of the action taken." 60 CJS Motions & Orders, §38, pg. 53.

Further:

> "Delay of the court in announcing its decision on a motion will not operate to the prejudice of the party in whose favor the decision is made, and the court must give effect to the decision as of the time when the motion was made." 60 CJS Motions & Orders, §38, pg. 54.

With this in mind it is all the more obvious that the failure of the trial court to rule on that portion of Petitioners' Rule 29(a) motion dealing with the failure of the Government to introduce sufficient evidence to show an extension of credit, as defined by Title 18, United States Code, §891, prior to the continuation of the trial was highly prejudicial to the substantial rights of Petitioners as defendants in a federal criminal prosecution.

CONCLUSION

For the above reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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